

LANCE LOGGING CO., INC.)	AGBCA Nos. 98-137-1,
dba WOLF CREEK INDUSTRIES,)	98-138-1, 98-139-1,
and WOLF CREEK INDUSTRIES, INC.,)	98-140-1, 98-141-1,
)	98-142-1, 98-143-1,
Appellants)	98-144-1, 98-145-1
)	
Representing the Appellants:)	
)	
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)	
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RULING OF THE BOARD OF CONTRACT APPEALS

March 20, 2001

Before HOURY, VERGILIO, and WESTBROOK, Administrative Judges.

Opinion for the Board by Administrative Judge VERGILIO.

On January 30, 1998, the Board received from Lance Logging Co., Inc. dba Wolf Creek Industries, and Wolf Creek Industries, Inc. (hereafter referred to without distinction as purchaser), both of Pagosa Springs, Colorado, a motion to reinstate appeals (AGBCA Nos. 95-109-1 through 95-114-1, 95-123-1, 95-124-1, and 95-198-1) earlier dismissed without prejudice by the Board. The appeals are reinstated as the present appeals.

The purchaser brought claims under eight timber sale contracts with the respondent, the U.S. Department of Agriculture, Forest Service. The purchaser alleges that the Government used timber cruise and measurement methods that overestimated the timber volumes available in each sale. It asserts that the volume estimates were inadequately or negligently prepared, and were grossly or unreasonably inaccurate. The contracting officer denied each claim. The purchaser pursues relief

under four theories: breach of contract, misrepresentation of fact, equitable estoppel, and unjust enrichment. The purchaser seeks the stated amount for the given timber sale in the San Juan National Forest in Colorado: \$614,943.30 for Trail Ridge; \$534,230.20 for First Notch; \$244,001.06 for Quien Sabe; \$325,857.30 for Lower Middle Mountain; \$222,753.81 for Lange Canyon; \$435,280.10 for Rock Springs; \$232,638.33 for Big Notch; and \$39,727.23 for South Monument.

The Board has jurisdiction over these timely-filed appeals pursuant to the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601-613, as amended. The Government has filed motions for summary judgment, the purchaser has filed oppositions.

The Board grants the Government's motions for summary judgment. As a matter of law, based upon uncontested facts (the language of the contracts), the purchaser is not entitled to the relief it seeks. Under various theories, the purchaser seeks to reform the contracts and shift to the Government risks the purchaser assumed. The contracts provided no guarantee of timber quantity. Each volume estimate was a factor used to price payments under the contracts. The contract prices were not dependent upon the actual volume of timber removed (as would be true in a scaled sale, which these contracts were not). The contracts stated that no adjustments in volume shall be made for variations in accuracy resulting from the measuring methods. The purchaser's theories of relief implicate allegedly ill-chosen methodologies for predicting timber volume. The contracts expressly preclude adjustments for volume variations arising from measuring methods.

The purchaser maintains that the Government was negligent in arriving at grossly erroneous estimates, and seeks relief based upon Government breach of contract. In six of the timber contracts, the purchaser submitted bids with a certification that it acknowledges that the estimates of timber volumes are not guaranteed and that there is no warranty, express or implied, of their accuracy. For each of the remaining two timber contracts, the purchaser submitted a bid containing an explicit Government disclaimer of quantity estimates and a purchaser warranty that the bid is submitted solely on the basis of its examination and inspection of the quantity of the timber offered, without reliance on the Government's estimate of quantity. Under these circumstances, there cannot be reasonable reliance by the purchaser on the volume estimates, such that the asserted Government improprieties (if proven) in the formulation of the estimates would not provide a basis for the legal relief sought.

The Board denies these appeals.

FINDINGS OF FACT

Trail Ridge, South Monument, First Notch, Quien Sabe, Lower Middle Mountain, and Big Notch

1. The "introduction" paragraph in each prospectus released for these six (Trail Ridge, South Monument, First Notch, Quien Sabe, Lower Middle Mountain, and Big Notch) timber sales in the San Juan National Forest, specifies:

This prospectus furnishes prospective bidders with information not contained in the published advertisement and is designed to enable bidders to decide whether or not to further investigate the sale. . . . Bidders are urged to examine the timber sale and make their own estimates. The sale uses form FS-2400-6T. Inspect the sale area and the sample contract before submitting a bid. Obtain the appraisal, other information on the timber, and conditions of sale and bidding at Forest Service offices named in the attached advertisement.

(Prospectus at 1 (¶ 1).)

2. Each prospectus for these six timber sales specifies that a pre-marked sale is involved (Prospectus at 1 (¶ 3)). Each prospectus contains a paragraph regarding “timber volumes and rates,” which states in pertinent part:

The quality, size, and age class of the timber are estimates based on detailed cruise information on file and available for inspection at the Forest Service offices listed in the advertisement. INFORMATION LISTED HEREIN IS MADE AVAILABLE WITH THE UNDERSTANDING THAT VALUES SHOWN ARE NOT ESTIMATES OF A PURCHASER’S OWN RECOVERY AND ARE NOT A PART OF THE TIMBER SALE CONTRACT.

(Prospectus at 1 (¶ 4).)

3. For each of these six contracts, the purchaser submitted a bid with the following certification: **“BIDDERS ACKNOWLEDGE THAT FOREST SERVICE ESTIMATES OF COSTS AND TIMBER VOLUMES ARE NOT GUARANTEED AND THAT THE FOREST SERVICE GRANTS NO WARRANTY, EXPRESS OR IMPLIED OF THEIR ACCURACY.”** (Form FS-2400-14 (4/84) at 2.)

4. For the Trail Ridge and South Monument sales, the timber volume estimates were derived using the D²H methodology. For the First Notch, Quien Sabe, Lower Middle Mountain, and Big Notch timber sales, the timber volume estimates were derived using the two-parameter stem profile method. (Purchaser’s Concise Statement of Issues at 4 (¶ 3).) These two methodologies utilize two tree measurements (diameter at breast height and tree height) to approximate the volume of timber through different equations; these methodologies contrast with the later used three-stem methodology which utilizes three measurements on a given tree. Even with species specific equations, no methodology is expected to exactly predict the volume of any particular tree, particularly given the individual variations in trees. Not every tree to be cut is necessarily measured. The selection and use of a methodology permits the Government to approximate the value of the sale. (Purchaser’s Concise Statement of Issues at 4 (¶ 4), 5 (¶ 5), 11 (¶ 20).)

5. With an award date of September 21, 1988, the purchaser obtained the Trail Ridge timber sale, Contract No. 06-001266, in the Pagosa Ranger District, in Hinsdale County, Colorado (Contract

at 1). With an award date of May 31, 1989, the purchaser obtained the South Monument timber sale, Contract No. 08-001373, in the Pine Ranger District, in Archuleta County, Colorado (Contract at 1). With an award date of February 27, 1990, the purchaser obtained the First Notch timber sale, Contract No. 08-001456, in the Pine Ranger District, in Archuleta County, Colorado (Contract at 1). With an award date of June 26, 1990, the purchaser obtained the Quien Sabe timber sale, Contract No. 06-001563, in the Pagosa Ranger District, outside Pagosa Springs, Colorado (Contract at 1). With an award date of November 7, 1990, the purchaser obtained the Lower Middle Mountain timber sale, Contract No. 06-001530, in the Pagosa Ranger District, west of Pagosa Springs, Colorado (Contract at 1). With an award date of August 1, 1991, the purchaser obtained the Big Notch timber sale, Contract No. 08-001654, in the Pine Ranger District, in Archuleta County, Colorado (Contract at 1).

Lange Canyon and Rock Springs

6. As in the six timber sales described above (Finding of Fact (FF) 1), the “introduction” paragraph in each prospectus released for these (Lange Canyon and Rock Springs) two timber sales in the San Juan National Forest specifies:

This prospectus furnishes prospective bidders with information not contained in the published advertisement and is designed to enable bidders to decide whether or not to further investigate the sale. . . . Bidders are urged to examine the timber sale and make their own estimates. The sale uses form FS-2400-6T. Inspect the sale area and the sample contract before submitting a bid. Obtain the appraisal, other information on the timber, and conditions of sale and bidding at Forest Service offices named in the attached advertisement.

(Prospectus at 1 (¶ 1).)

7. As in the six timber sales described above (FF 2), each prospectus released for these two timber sales contains a paragraph regarding “timber volumes and rates,” which states in pertinent part:

The quality, size, and age class of the timber are estimates based on detailed cruise information on file and available for inspection at the Forest Service offices listed in the advertisement. INFORMATION LISTED HEREIN IS MADE AVAILABLE WITH THE UNDERSTANDING THAT VALUES SHOWN ARE NOT ESTIMATES OF A PURCHASER’S OWN RECOVERY AND ARE NOT A PART OF THE TIMBER SALE CONTRACT.

(Prospectus at 1 (¶ 4).) The prospectus for the Rock Springs sale specifies that it is a pre-marked sale (Prospectus at 1 (¶ 3)). The prospectus for the Lange Canyon sale specifies that the sale was cruised (Prospectus at 3 (¶ 13)). Neither party contends that it was other than a pre-marked sale.

8. The bid form for each of these two contracts contains a paragraph, regarding the “terms of bidder’s offer,” which states that the

bidder agrees that the written provisions of this bid form (together with any attachments) and the sample sale contract constitute the entire agreement of the parties until a written contract is executed and neither the bid form (and any attachments) nor the sample contract can be orally modified. Bidder expressly adopts the terms of this bid form and the sample contract as material parts of its offer for the advertised timber.

((Form FS-2400-14 (9/91) page 2 of 5 (¶ 22).)

9. The signature page of the bid for each of these contracts specifies:

23. DISCLAIMER OF ESTIMATES AND BIDDER’S WARRANTY OF INSPECTION: BEFORE SUBMITTING THIS BID, BIDDER IS ADVISED AND CAUTIONED TO INSPECT THE SALE AREA, REVIEW THE REQUIREMENTS OF THE SAMPLE TIMBER SALE CONTRACT, AND TAKE SUCH OTHER STEPS AS MAY BE REASONABLY NECESSARY TO ASCERTAIN THE LOCATION, ESTIMATED VOLUMES, CONSTRUCTION ESTIMATES AND OPERATING COSTS OF THE OFFERED TIMBER. FAILURE TO DO SO WILL NOT RELIEVE BIDDERS FROM RESPONSIBILITY FOR COMPLETING THE CONTRACT.

BIDDER/PURCHASER WARRANTS THAT THIS BID/OFFER IS SUBMITTED SOLELY ON THE BASIS OF ITS EXAMINATION AND INSPECTION OF THE QUALITY AND QUANTITY OF THE TIMBER OFFERED FOR SALE AND IS BASED SOLELY ON ITS OPINION OF THE VALUE THEREOF AND ITS COSTS OF RECOVERY, WITHOUT ANY RELIANCE ON FOREST SERVICE ESTIMATES OF TIMBER QUALITY, QUANTITY OR COSTS OF RECOVERY. BIDDER FURTHER ACKNOWLEDGES THAT THE FOREST SERVICE: (i) EXPRESSLY DISCLAIMS ANY WARRANTY OF FITNESS OF TIMBER FOR ANY PURPOSE; (ii) OFFERS THIS TIMBER AS IS WITHOUT ANY WARRANTY OF QUALITY (MERCHANTABILITY) OR QUANTITY AND, (iii) EXPRESSLY DISCLAIMS ANY WARRANTY AS TO THE QUANTITY OR QUALITY OF TIMBER SOLD EXCEPT AS MAY BE EXPRESSLY WARRANTED IN THE SAMPLE CONTRACT.

BIDDER/PURCHASER FURTHER HOLDS FOREST SERVICE HARMLESS FOR ANY ERROR, MISTAKE, OR NEGLIGENCE REGARDING ESTIMATES EXCEPT AS EXPRESSLY WARRANTED AGAINST IN THE SAMPLE CONTRACT.

((Form FS-2400-14 (9/91) page 3 of 5 (¶ 23).)

10. For these two timber sales, volume estimates were derived using the two-parameter stem profile method (Purchaser's Concise Statement of Issues at 4 (¶ 3)).

11. With an award date of September 4, 1992, the purchaser obtained the Rock Springs timber sale, Contract No. 05-001738, in the Mancos Ranger District, in Montezuma County, Colorado (Contract at 1). With an award date of June 23, 1993, the purchaser obtained the Lange Canyon timber sale, Contract No. 08-001860, in the Pine Ranger District, in Archuleta County and La Plata County, Colorado (Contract at 1).

Other provisions applicable to all of the contracts

12. All of the contracts expressly state that the written terms of the contract (which consists of three divisions--AT (specific conditions), BT (standard provisions) and CT (special provisions)--represent the premises and promises of the agreement (Contract, Form FS-2400-6T, page 101 (10/73)).

13. Under each contract, the purchaser is to remove all timber meeting specific characteristics (e.g., species, diameter at breast height, length) (Contract, Form FS-2400-6T, page 102 (¶ AT2)). Under each contract, payment occurs as follows: current contract rates in effect when a payment unit (a portion of the sale area established for payment purposes) is released for cutting shall be applied to the timber quantities to determine the amount purchaser shall pay (Contract at 116 (¶ BT4.1)). The actual volume of timber removed is not a factor in calculating the payment obligations of the purchaser. None of these contracts is a scaled sale, under which payment would be determined by the actual volume of timber removed.

14. All of the contracts contain an Adjustment of Volume clause (CT4.12 (6/81)), which permits adjustments in a volume estimate when an incorrect volume estimate is caused by (a) an area determination error, (b) computer input error or computer malfunction, or (c) a calculation error. The clause specifies, "No adjustments in volume shall be made for variation in accuracy resulting from planned sampling and measuring methods or judgments of timber quality or defect."

15. The Forest Service cruise print-out for each sale showed whether the cruise was processed using the D²H or two-parameter stem profile methodology.¹ The purchaser has not suggested that it made specific inquiries regarding the methodology used on any particular sale, or that the Government incorrectly responded to any such inquiry.

¹ The Government proposes this an undisputed material fact, supported by a declaration; that is, that the available information identified in the prospectus specified the measurement methodology. The purchaser seeks to strike the alleged fact, but has provided no substantiated basis to dispute the assertion.

16. Prior to bidding on each of the eight sales, the purchaser had an experienced logger walk the sale area and visually estimate the volume (Purchaser's Proposed Findings of Uncontroverted Fact at 2 (¶ 10)).

Additional information

17. An individual, one of the shareholders of the purchaser, declares that in approximately 1987, he was a party to a conversation with a contracting officer involved in the here-disputed sales, in which the purchaser expressed concerns about the pre-measurement program. The individual states that the contracting officer "gave us the assurance that the timber sales would cut out with harvested volumes equal to or greater than those stated in the timber sale contract." The individual "made no attempt to perform a detailed volume cruise of the timber prior to bidding each sale[here at issue]. Such a cruise was both cost prohibitive and beyond the scope of our company's expertise. My calculations to determine how much our company could bid assumed that we would receive the volume in Scribner Decimal C board foot log scale upon which the Forest Service predicated the whole timber sale contract." (Declaration of Arthur D. Lance at 1-2.)

18. The purchaser maintains in its opposition to the Government's motions:

Since the Forest Service profile equations average taper classes across the National Forests in the Rocky Mountain Region, significant biases are likely to occur when applied to individual stands, especially in geographical areas such as the S[an Juan National Forest], where only a small percent of the sample was taken. In addition, there will be local variations within sale areas depending on site. These local variations can be accounted for by using cruising techniques that measure a sample of trees from the area being inventoried and relies on these local measurements to adjust the general tree taper equations. The Forest Service did not make any such local adjustments to account for difference in tree form.

(Purchaser Opposition to the Government's Motion for Partial Summary Judgment at 9.)

19. The purchaser maintains that it harvested less timber than the volume estimates for each of the timber sales. It contends that the actual volume it removed varied between 9% and 32% below the volume estimates: Trail Ridge 14%; First Notch 32%; Quien Sabe 22%; Lower Middle Mountain 11%; Lange Canyon 21%; Rock Springs 9%; Big Notch 20%; and South Monument 27%. It contends that overall it experienced an 18% volume underrun. (Purchaser's Exhibits in Support of its Opposition to the Government's Motion for Partial Summary Judgment, Exhibit 2 at 21.)

20. During performance, the purchaser notified the contracting officer that actual volumes were falling short of the volume estimates. Various discussions did not result in reforming any of these

contracts to alter the price or quantity.² The purchaser filed claims under each contract. The contracting officer denied the claims. The purchaser timely filed appeals at this Board. Initial appeals were dismissed pursuant to Rule 30, by joint agreement of the parties, as the purchaser was involved in bankruptcy proceedings. Lance Logging Co., AGBCA Nos. 95-109-1, et al. (Oct. 7, 1996). The purchaser filed a request to reinstate these appeals, as presently docketed.

DISCUSSION

A forum may grant a motion for summary judgment when no genuine issue of material fact remains and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 255 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

Each prospectus and bid, as well as each contract, expressly indicates that the Government made no warranty as to the quantity of timber to be recovered under the contract. The volume estimates are used when calculating the price of a contract, but the purchaser is not guaranteed any particular volume of timber. The contract price is not dependent upon the actual volume of timber harvested. The purchaser did not purchase a designated volume of timber and did not agree to pay the unit prices for the actual volume of timber removed. Rather, the purchaser agreed to pay, in essence, a lump sum for timber satisfying specific requirements within designated areas. The Government disclaimers and affirmative acknowledgments by this purchaser were explicit and unambiguous, such that there is no need for extrinsic evidence about the meaning of the contracts. Webco Lumber, Inc. v. United States, 230 Ct. Cl. 457, 463, 677 F.2d 860, 864 (1982); Doug Jones Sawmill, AGBCA No. 94-193-1, 96-1 BCA ¶ 28,176, at 140,655 (“It is well established that estimated timber volumes are not warranties or guarantees of the actual timber volume, particularly where the contract includes a clear disclaimer.”) (and cases cited therein).

Each of the contracts contains an Adjustment of Volume clause (FF 14), which permits adjustments in a volume estimate when an incorrect volume estimate is caused by (a) an area determination error, (b) computer input error or computer malfunction, or (c) a calculation error. The clause specifies, “No adjustments in volume shall be made for variation in accuracy resulting from planned sampling and measuring methods or judgments of timber quality or defect.” The facts do not support relief

² For example, in September 1990, the purchaser expressed to a Forest Service representative the purchaser’s concern of a possible underrun in the First Notch sale. In February 1991, the Forest Service agreed to perform a complete audit of the First Notch cruise to identify possible errors that may have occurred as outlined in the Adjustment of Volume clause; the Forest Service also agreed to review the purchaser’s scale records of the timber it removed. The contracting officer stated in a letter, dated February 19, 1991, to the purchaser: “I cannot predict the outcome of the review but any and all information and assistance you offer will be welcomed and could help us in determining if an error was made.” As the purchaser summarizes the events: “Lulled by verbal assurances, agreements, and other assurances by the Forest Service that indicated the situation would be dealt with fairly and equitably, Wolf Creek bid heavily on upcoming timber sales.” (Declaration of Arthur D. Lance at 3-4 and Exhibit 3 (Letter dated Feb. 19, 1991).)

under any of the three identified bases for adjustments in volume. Rather, the theories implicate allegedly ill-chosen methodologies for predicting timber volume. The contracts expressly preclude adjustments for errors in measuring methods. Therefore, under these terms of the contracts no relief is available.

The purchaser seeks to reform these contracts so as to shift to the Government risks explicitly placed upon the purchaser. The prospectuses and contracts explicitly state that the Government is not warranting the accuracy of the volume estimates; the contracts provide that volume will not be adjusted when an inaccuracy arises from the methodology used. Reliance by the purchaser on the volume estimates in pricing its bid is not reasonable.³ Therefore, even if the purchaser were to demonstrate that the Government inappropriately arrived at the volume estimates or that the volume estimates proved to be grossly or unreasonably inaccurate, the purchaser would not be entitled to the relief it seeks. Gregory Lumber Co. v. United States, No. 134-81C, 29 CCF ¶ 82,637 (June 4, 1982); Roseburg Lumber Co. v. Madigan, 978 F.2d 660, 667 (1992) (“In order to justify reformation of a contract and damages on the ground of misrepresentation, innocent or not, the evidence must establish not only the existence of a misrepresentation, but also that the party seeking relief both relied upon such misrepresentation, and was damaged thereby”).

This analysis resolves these disputes. However, the Board addresses each basis for relief raised by the purchaser.

Breach of contract

Alleging that the volume estimates were both inadequately or negligently prepared and are grossly or unreasonably inaccurate, the purchaser concludes that the Government breached the contracts. Also, the purchaser asserts that the contracts imposed an implied obligation of good faith and fair dealing, which the Government breached by making material misrepresentations and/or omissions of fact to induce purchaser to relocate logging and sawmill operations and to enter into and continue performing under the contracts.

Regarding the allegation that the estimates were inadequately or negligently prepared, the purchaser faults the Government’s methodology for failing to make any adjustments for the local conditions of trees, when the Government was aware of the limitations of its methodology in accurately predicting the volume of timber to be removed. This Board has noted that, when calculating volume estimates, the Forest Service “has discretion in choosing what method to use. It is not obligated to incur the expense of the most accurate cruise nor is it required to measure every tree. The [Forest

³ Here, the purchaser maintains that it inspected each sale area and visually estimated the volume of timber to be removed, although it did not cruise any area or more specifically attempt to determine volume. When pricing its bid, if the purchaser did not rely upon the volume estimates, there is no basis for relief; if the purchaser did rely upon the volume estimates (despite the disclaimers and, in two instances, contrary to its express representation), the reliance was not reasonable.

Service] has wide discretion to select the cruise method based upon cost/benefit considerations, as it did in this instance. It did not hide the nature of the methodology used.” Doug Jones Sawmill, AGBCA No. 94-193-1, 96-1 BCA ¶ 28,176, at 140,656. In Doug Jones, the Government and purchaser knew of the limitations of the methodology, and the cruise materials addressed a potential variation of $\pm 20\%$ from the estimate.

In resolving these motions for summary relief, the Board assumes that the Government was aware of potential limitations of the methodology. However, this purchaser apparently did not attempt to determine what methodology the Government employed. Moreover, the purchaser assumes that the failure to account for local variations always would result in an overestimate of the timber volume. The record does not suggest that such a one-sided error would necessarily occur, or that a Government official knew at the time of any award that any estimated volume was inaccurate, in fact. In short, a potential limitation of a methodology does not necessarily extrapolate to an inaccurate volume estimate in a given situation. The Adjustment of Volume clause (FF 14) places the risks of an inaccurate methodology on the purchaser.

Regarding the allegation that the estimates were grossly or unreasonably inaccurate, the overall underrun claimed by the purchaser of approximately 18%, and underruns of specific sales said to range between 9% and 32%. These figures do not represent grossly or unreasonably inaccurate estimates.

The purchaser maintains that to induce it to enter into and continue performing the contracts, the Government made numerous material misrepresentations and/or omission of fact. As examples, the purchaser states that the Government failed to advise that the D²H method with its inherent problems was being used, and that, thereafter, “a new, untested and significant change in the Forest Service’s cruise methodology, the 2-parameter stem profile model, had been introduced.” Further, it asserts that the Government misled it as to how a substantial volume underrun would be dealt with under the contracts and specifically by stating that the complete scale records maintained by the purchaser would be readily accepted over an inaccurate cruise. (Purchaser’s Concise Statement of Issues at 17 (¶ 37)).

The Government was not obligated to expressly inform the purchaser of the methodology employed to calculate the volume estimates. The available information referenced in the prospectus identified whether the cruise was processed using the D²H or two-parameter stem profile methodology (FF 15). The purchaser attempts to shift to the Government risks placed upon the purchaser, when the purchaser could have made inquiries during the bidding process. This is not a case where the purchaser was provided incorrect information about the methodology utilized or where the Government withheld information requested by the purchaser prior to award.

The oral assurances allegedly provided before and after award as to how the Government would deal with volume adjustments (FF 17, 20) are not relevant to the analysis. The contracts explicitly provide that the obligations thereunder are expressed in the written terms of the agreement. Oral statements do not bind the Government under the contracts, which dictate that the purchaser is

required to pay based upon the volume estimates although there is no guarantee that the estimates are accurate. (FF 9, 12.) Moreover, the alleged assurances are not represented as commitments by the Government to alter the price or quantity under any contract; rather, the Government sought information to assess and evaluate the situation (FF 20).

In support of its allegation of Governmental bad faith, the purchaser's reliance upon the ill-reasoned majority opinion of a board whose decisions lack precedential value here, Travel Centre, GSBCA No. 14057, 98-1 BCA ¶ 29,541, proves to have been misplaced, as the underlying entitlement decision was reversed after the purchaser cited it. Travel Centre v. Barram, 236 F.3d 1316 (Fed. Cir. 2001). Borrowing from that court's analysis, this purchaser entered into contracts explicitly stating, within their four corners, that the purchaser's payment obligations were to be based on the volume estimates but that the Government was not warranting the accuracy of the volume estimates as representative of the timber volumes the purchaser would actually remove. Based upon the language of the prospectuses and contracts, the purchaser could not have had a reasonable expectation, based solely upon the volume estimates whose accuracy the Government explicitly disclaimed, that it would actually harvest the volume estimates. Moreover, in two of the eight contracts, the purchaser expressly represented that it had not relied upon Forest Service estimates of timber quantity in formulating its bids. (In fact, for each contract, the purchaser relied upon the visual inspection and volume estimate of an experienced logger.) The purchaser has not suggested that the Government prohibited the purchaser from obtaining all timber as defined within the agreement; removable timber was not limited or restricted by the volume estimates.

The purchaser has not demonstrated a basis for this Board to conclude that the Government failed to satisfy its legal obligations under the contracts. Accordingly, the purchaser lacks entitlement to the legal relief requested.

Misrepresentation of fact

Similar to the breach of contract assertions, the purchaser maintains that the Government made numerous material misrepresentations and/or omissions of fact to induce it to relocate, contract, and continue performance. Claiming damage as a result of reliance on the alleged misrepresentations, the purchaser seeks contract reformation to reflect actual volumes of timber harvested.

The attempt by the purchaser to read into the contracts assurances said to have been provided by the contracting officer during the formation and performance of the contracts (FF 17, 20) is not consistent with the definition of what constitutes each contract. Each contract expressly states that the written terms and conditions represent the premises and promises of the agreement (FF 12). Two of the contracts are more explicit, in stating that written agreement cannot be orally modified (FF 8). Thus, when entering into or performing the contracts, any reliance upon oral representations or assurances (which the Board assumes to have been made for purposes of resolving these motions) given by the Government would not be reasonable so as to obligate the Government to provide more than the written terms and conditions of the timber sales provided. As noted above, the contracts expressly provide that volume estimates will not be adjusted for variations due to the methodology

used for estimating and expressly state that the Government disclaims the accuracy of the volume estimates. These contractual terms, which were not misrepresented, fully support the Government determination to not adjust the contract prices as requested by the purchaser.

Moreover, to give effect now to the alleged assurances of timber quantity or guarantees of adjustments for underruns, which are not part of the express contracts, would provide this purchaser with an unfair competitive advantage in the bidding process. The contracts specify that payments are to be calculated utilizing the volume estimates, although there is no guarantee that the purchaser will harvest any stated volume. To read any of these contracts as providing a guarantee of the volumes or as ensuring adjustments for underruns would be contrary to the express terms of the agreements and would reflect contracts for which others could not have competed.

Somewhat analogously to misrepresentation, the purchaser suggests that mutual mistake can serve as a basis to reform the contracts. The premise is that at the time of entering into the contracts, the parties operated on the assumption that the volume estimates were reasonably accurate. Because, alleges the purchaser, the estimates proved to be grossly and unreasonably inaccurate compared to actual volumes, it is entitled to reformation to reflect actual volumes of timber harvested. The purchaser cannot demonstrate such a mutual mistake in light of the express language of each contract, under which the Government expressly disclaims the accuracy of the volume estimates and the purchaser acknowledges that the Government is not warranting the accuracy of the given volumes (FF 2, 3, 7, 9). Given the explicit provisions of the agreement, the Board cannot find a mistake by the Government which would lead to relief to the purchaser; the contract placed risks upon the purchaser for variations between actual and estimated timber volumes. To the extent that the purchaser was mistaken about volume estimates, such was either a unilateral mistake or an erroneous judgment as to the volume of timber available under each sale. These do not represent compensable situations.

Equitable estoppel

The purchaser contends that the Government should be estopped from benefitting from its negligence or lack of diligence in providing grossly inaccurate information, which induced the purchaser to believe that the estimated volumes were reasonable.

The purchaser has failed to put forward a legal theory which entitles it to relief under the facts. The purchaser concluded that the estimated volumes were reasonable, after the purchaser had an experienced logger walk the sale areas and visually estimate the volume, while the bid forms expressly stated that the Government disclaims the accuracy of the estimates. The equities of the situation do not lie with purchaser.

Unjust enrichment

The purchaser begins with the assertion that the Government received payments for 17,733.44 thousand board feet (MBF) of sawtimber but only provided 14,561.25 MBF under the contracts. The

purchaser concludes that the Government has unjustly benefitted and been enriched in the amount of \$265,789.88.

The purchaser mischaracterizes the contracts. The Government did not receive payments for a fixed volume of timber, and the contracts did not obligate the Government to provide a fixed volume of timber. Rather, under the contracts, the purchaser would remove designated timber; the actual volume to be removed was not dependent upon the volume estimates. The contracts (FF 13, 14) specify that payment occurs based upon accepted rates and the volume estimates, with variations in volume to occur under specified conditions not present here. The purchaser has not demonstrated that the Government deviated from the terms of the contract in assessing amounts due the Government. The Government has not been enriched unjustly.

RULING

The Board grants the motions for summary judgment of the Government. As a matter of law, the purchaser is not entitled to relief. The Board denies these appeals.

JOSEPH A. VERGILIO
Administrative Judge

Concurring:

EDWARD HOURY
Administrative Judge

ANNE W. WESTBROOK
Administrative Judge

Issued in Washington, D.C.
March 20, 2001